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Supreme Court of the United States.

OCTOBER TERM, 1973.

No.

ANGELO ROSSI, JR., ET AL.,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioners Angelo Rossi, Jr., Howard Silverman and William Silverman pray that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this case on May 31, 1974.

Opinions Below.

The Court of Appeals in this case did not write an opinion. The text of the judgment order is reprinted as Appendix A hereto, *infra*. The district court filed an opinion on November 13, 1973, which has not yet been reported. It is reprinted as Appendix B hereto, *infra*.

Jurisdiction.

The judgment order of the Court of Appeals was entered on May 31, 1974. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented.

1. Whether the post-trial disclosure by the government of an expectation of lenient treatment on the part of the chief prosecution witness, based upon alleged promises by the government in return for his testimony against certain defendants possibly including petitioners, constituted a violation of the government's responsibility to have disclosed such circumstances prior to the trial, under the rule set forth in *Giglio* v. *United States,* 405 U.S. 150 (1972), and amounted to a violation of due process of law, thereby requiring a new trial.

2. Whether petitioners were denied substantial due process of law and a meaningful hearing by the refusal of the district court to require the production by the government of the chief prosecution witness at the evidentiary hearing held on petitioners' motion for new trial upon newly discovered evidence, where both the petitioners and the government seriously questioned the credibility of said witness following his post-trial testimony regarding this case before a Senate Committee; and whether the refusal to require the production of said witness was in violation of this Court's ruling in *DeMarco* v. *United States,* 415 U.S. (1974).

Constitutional Provision Involved.

CONSTITUTION OF THE UNITED STATES.

Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Statement of the Case.

Petitioners seek a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit, entered in this case on May 31, 1974, affirming the denial of the motion of defendants Angelo Rossi, Jr., Howard Silverman and William Silverman for a new trial upon newly discovered evidence The motion for new trial was denied by the District Court for the District of New Jersey, Leonard I. Garth, U.S.C.J. (sitting by designation as a District Judge pursuant to 28 U.S.C. § 291 (c)), on October 30, 1973 (N. App. 22).*

Prior Proceedings and Facts.

The motion upon which this petition is based concerns evidence discovered subsequent to the trial and conviction of petitioners. The final judgments of conviction were entered on February 8, 1973, and February 26, 1973, in the District Court for the District of New Jersey in *United States* v. *Anthony Salerno et al.* (District Court Cr. No. 116-70). These convictions were appealed to the Court of Appeals for the Third Circuit (Nos. 73-1195, 73-1196, 73-1197) and the judgments were affirmed on September 25, 1973, 485 F. 2d 260 (3d Cir. 1973). Certiorari was denied by this Court on March 25, 1974, 415 U.S. (42 U.S.L.W. 3536).

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* References in this petition to "T." shall be to the transcript of trial testimony; references to "R." shall be to the "Joint Appendix" filed in the Court of Appeals for the Third Circuit, more properly denominated "Consolidated Appendix" in connection with the trial of the case in chief; references to "N. App." shall be to the "Consolidated Appendix" filed in the Court of Appeals for the Third Circuit in connection with the appeal from the denial of the motion for new trial.

Petitioners' original motion for new trial upon newly discovered evidence was first filed before the Court of Appeals on August 24, 1973, together with a motion for remand to the district court (N. App. 2, 3-15). This motion was filed long before the appeal from the judgments of conviction were argued, in an effort by petitioners to combine both aspects of this case for appellate review. In its opinion of September 25, 1973, affirming the judgments of conviction, the Court of Appeals also denied the motion for remand solely on the ground that "remand is proper only after the district court has ruled on such motion for a new trial." *United States* v. *Salerno*, 485 F. 2d 260, 262, fn. 2 (3d Cir. 1973).

Thereupon petitioners filed a motion for new trial upon newly discovered evidence in the district court on September 28, 1973, and a hearing on that motion was held before Judge Garth on October 30, 1973. The motion was denied by written opinion filed on November 13, 1973, and an order encompassing said decision was filed on November 14, 1973. (Appendix B, *infra.*) On May 31, 1974, the Court of Appeals affirmed the order of the district court. (Appendix A.)

The existence of the newly discovered evidence upon which petitioners' motion was based was revealed by the chief prosecution witness, Gerald Martin Zelmanowitz, in testimony under oath before the United States Senate Permanent Sub-Committee on Investigations in Washington, D.C., on July 13, 1973, nine months after the trial.

The newly discovered evidence relevant to the questions presented in this petition may be summarized as follows:

Question Presented No. 1—As to the disclosure of expectation of lenient treatment.

Mr. Zelmanowitz testified at the trial, in October, 1972, that he had received no promises from the government in

connection with his testimony (T. 1785-1786; R. II—303-304). On July 13, 1973, he testified before the United States Senate Permanent Sub-Committee on Investigations

> "that he had received promises from the United States that he would be treated in a manner such that he would receive immunity as well as assurances that another pending case in which he was involved would be 'resolved.'" (Hearings, pages 134-135.)*

Question Presented No. 2—As to the credibility of the chief prosecution witness as a result of his contradictory Senate testimony.

The trial court and petitioners Angelo Rossi, Jr., Howard Silverman and William Silverman were informed on or about October 17, 1972, by counsel for the defendant Anthony Salerno that Mr. Zelmanowitz had only then and there in open court before the jury stated that the man on trial (defendant Anthony Salerno) was not the person with whom he had allegedly conspired (T. 1465-1543; R. II—37-98). On October 18, 1972, Mr. Herbert Stern, United States Attorney, testified under oath that information had "just" come to him which raised a question as to whether the defendant Salerno was guilty (T. 1539-1540; R. II—94-95).

As a result of this disclosure, the district court allowed a trial severance of defendant Salerno (T. 1564; R. II—119). On July 13, 1973, Mr. Zelmanowitz testified before

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* References in this petition to "Hearings" shall be to the "Stenographic Transcript of Hearings" before the United States Senate Permanent Sub-Committee on Investigations—Traffic in Stolen and Counterfeit Securities and Related Frauds in the United States and International Markets—July 13, 1973—Washington, D.C.—Reynolds Reporting Associates, Inc., Official Reporters; marked as Ex. C-2 in the transcript of proceedings (Motion for New Trial).

the United States Senate Permanent Sub-Committee that he had informed the United States on at least two occasions *before trial* that the defendant Anthony Salerno was not the person he had known and with whom he had conspired (Hearings, page 224, emphasis supplied).

Additionally, Mr. Zelmanowitz testified at trial that he was unable to remember whether he had ever been shown photographs of defendant Anthony Salerno by the United States in the period from April, 1968, to October, 1972 (T. 1837; R. II—336). On July 13, 1973, Mr. Zelmanowitz testified before the United States Senate Permanent Sub-Committee on Investigations that he had been shown photographs of defendant Anthony Salerno on several occasions shortly before the trial (Hearings, page 224).

The testimony given at the hearing held by the trial court on petitioners' new trial motion on October 30, 1973, with regard to the two questions presented may be summarized as follows:

(1) The government denied that any promises had been made and indicated that any alleged promises, if any existed, were made by a former United States Attorney prior to the trial in 1970 of one Anthony DeCarlo (*United States* v. *DeCarlo* (D.N.J. 1970, Cr. No. 382-69)) and were repeatedly denied by the current United States Attorney (then Assistant United States Attorney) during the course of that trial. The government also insisted that neither the United States Attorney nor any of his assistants made any promises to Mr. Zelmanowitz regarding favorable treatment at the time of the trial of the present petitioners (N. pages 121-125, 128-132).*

* References in this petition to "N." shall be to the transcript of proceedings, motion for new trial, October 30, 1973, Newark, New Jersey.

(2) The government stressed that the question of the identification of defendant Anthony Salerno was never raised in pretrial preparation sessions with Zelmanowitz; that, to the best of its knowledge, neither the United States Attorney nor any of his assistants had shown a photograph of Anthony Salerno to Zelmanowitz prior to the Salerno trial; that Zelmanowitz had never informed the government at any point prior to trial that he could not identify the defendant Anthony Salerno; and that the first knowledge the government had of Zelmanowitz' inability to identify Salerno was when he so indicated during the trial. (N. pages 125-127, 140-141, 143-147, 149-152.)

The petitioners requested the presence of Zelmanowitz at the hearing on the motion for new trial and took all appropriate steps to require his appearance. The government agreed to produce him only if the Court so ordered (N. pages 118-119). The Court, although requested by the defendants to produce Zelmanowitz, refused to do so (N. pages 96, 156).

Reasons for Granting the Writ.

The widespread and, one must observe, expanding use of informer witnesses in cases large and small has prompted this Court to insist upon a high degree of responsibility on the part of the United States Attorney when the credibility and motivation of such witnesses have been called into question. This case presents to this Court two serious instances in which petitioners were impeded in their trial cross-examination of the chief prosecution witness because the government failed to conform its practice to the requirements of due process.

I. THE POST-TRIAL DISCLOSURE BY THE GOVERNMENT OF AN EXPECTATION OF LENIENT TREATMENT ON THE PART OF THE CHIEF PROSECUTION WITNESS, BASED UPON ALLEGED PROMISES BY THE GOVERNMENT IN RETURN FOR HIS TESTIMONY AGAINST CERTAIN DEFENDANTS POSSIBLY INCLUDING PETITIONERS, CONSTITUTED A VIOLATION OF THE GOVERNMENT'S RESPONSIBILITY TO HAVE DISCLOSED SUCH CIRCUMSTANCES PRIOR TO THE TRIAL UNDER THE RULE SET FORTH IN GIGLIO V. UNITED STATES, 405 U.S. 150 (1972), AND AMOUNTED TO A VIOLATION OF DUE PROCESS OF LAW, THEREBY REQUIRING A NEW TRIAL.

The post-trial disclosure by the government of a previously undisclosed expectation of lenient treatment on the part of the chief prosecution witness, based upon alleged promises by the government in return for his testimony against certain defendants possibly including the petitioners, constituted a violation of the government's responsibility to have disclosed such expectation prior to trial under the rule set forth in *Giglio* v. *United States,* 405 U.S. 150 (1972).

The newly discovered evidence, as revealed by the chief prosecution witness, Gerald Martin Zelmanowitz, in his testimony under oath before the United States Senate Permanent Sub-Committee on Investigations on July 13, 1973, and as presented to the district court at the hearing on petitioners' motion for new trial, clearly shows that Zelmanowitz, although testifying to the contrary in the Salerno trial, had a continual expectation of lenient treatment from the government. The anticipated lenient treatment consisted of both (1) disposition of the charges against him in so favorable a manner as to amount to immunity, and (2) intercession, by the Justice Department, before the Internal Revenue Service in his behalf, in con-

nection with substantial personal tax liabilities. This "expectation," petitioners submit, was formed prior to the DeCarlo trial in 1970 and continued through the period of the Salerno trial in 1972, and beyond to 1973, and was known to the government but not to the defendants. It constitutes the basis for petitioners' claimed right to a new trial or, alternatively, to a full meaningful evidentiary hearing on their new trial motion; *Giglio* v. *United States,* 405 U.S. 150 (1972); see also the dissenting opinion of Gibbons, C.J., in *United States* v. *Newman,* 476 F. 2d 733 (3d Cir. 1973), especially at 744.

The convictions of the petitioners in this case resulted largely, if not exclusively, from the testimony of Zelmanowitz, as a defendant in the case who had originally pleaded not guilty, but who subsequently changed his plea to guilty and testified as a witness for the government. At the hearing upon his change of plea on October 2, 1972, the following colloquy took place among the court, the defendant Zelmanowitz, Assistant United States Attorney Richard M. Langway, and counsel for Mr. Zelmanowitz, Thomas F. Daly, III:

> "THE COURT: Have there been any threats or promises made to you to induce you to plead guilty?
>
> "DEFENDANT ZELMANOWITZ: None, your Honor.
>
> "THE COURT: Has there been any understanding or any prediction made to you concerning the sentence that you will receive?
>
> "DEFENDANT ZELMANOWITZ: None whatsoever.
>
> "THE COURT: I now inquire of the United States Attorney, and of you, Mr. Zelmanowitz, and of you. Mr. Daly, whether or not there have been any plea negotiations? Before permitting you to respond, I advise you that the United States Supreme Court has specifically

approved plea bargaining and has said that it is an essential component of the administration of justice to be incurred. You may therefore advise me truthfully of any plea negotiations without the slightest fear of any disapproval of the Court. Has there been?

"MR. LANGWAY: No.

"THE COURT: Has there been any communication between you and Mr. Langway, or any member of the United States Attorney's Office, or with the Court, or any member of the Court, concerning what the sentence of Mr. Zelmanowitz would be, or any promise made of any sort whatsoever with respect to his pleading guilty?

"MR. DALY: No, sir.

"THE COURT: And you, Mr. Zelmanowitz, are there any representations that have been made to you by your counsel which purported to come from a conversation between your counsel and the United States Attorney, or between you and the United States Attorney, or between you and any member of the Court, respecting the dimensions of your sentence or respecting what would happen with respect to your own penalty or sentence in the event you pleaded guilty?

"DEFENDANT ZELMANOWITZ: There has been none." (Ex. C-1 [Trial Transcript], Hearing on New Trial Motion; N. pages 6-7).

At the conclusion of his extensive direct examination at trial later in October, 1972, Zelmanowitz was asked the following as the last question by the Assistant United States Attorney and gave the following answer:

"Q. Mr. Zelmanowitz, have any promises been made to you by the United States in connection with your testimony here today?

"A. None." (T. 1785-1786; R. II—303-304.)

Trial counsel for the petitioners, on the basis of information then available to them, were unable to modify this answer by cross-examination. Nor were they able to grasp the significance of the possibly intended limitation contained in the question by the use of the phrase "here today."

Nine months later, on July 13, 1973, Zelmanowitz testified under oath in Washington, D.C., before the United States Senate Permanent Sub-Committee on Investigations which was holding hearings on "Traffic In Stolen And Counterfeit Securities And Related Frauds In the United States And International Markets." In the course of his testimony, Mr. Zelmanowitz discussed his activities in the period from at least 1968 to 1973 and referred to the information and assistance he had given to the government in obtaining indictments and convictions against both Angelo DeCarlo, in *United States* v. *DeCarlo* (D.N.J. 1970, Cr. No. 382-69), and the petitioners in *United States* v. *Salerno* (D.N.J. 1972, Cr. No. 116-70).* At the Senate Sub-Committee hearings, Mr. Zelmanowitz testified as follows with regard to the issue of promises:

> "At meetings with U.S. Attorneys I was told that if I would testify .... I would be treated in a manner that I would receive immunity and not be prosecuted for these disclosures.
>
> "Additionall [*sic*], at that time I had a suit against the IRS being heard before Federal District Court Judge Augelli in Newark, New Jersey, in relation to certain funds of mine that had been seized via jeopardy assessment. This case involved interest equalization

* Specific reference to the transactions upon which *United States* v. *Salerno* was based and to the current defendants is made by Zelmanowitz at pages 126-130 of these Senate hearings.

taxes and I was proceeding before the Federal judge to receive relief from the Internal Revenue Service and force the IRS to give certain documents to me to relieve myself of interest equalization taxes.

"It was determined that if my tax case could be resolved, that this money would be of vital necessity in order for me to relocate because of the tremendous expense that would be incurred by myself and that these funds would also be necessary to help create a new life for myself. Eventually, after innumerable hours in discussion with the U.S. Attorneys and the FBI, between myself and my family, which included my two children, my mother-in-law and father-in-law who lived with me and my wife, and after very persuasive conversations, we finally decided, my family and I, that yes, *I would testify for the United States Government, relying on the government's promises.*" (Hearings, pages 134-135, emphasis supplied.)

Although these meetings took place in or about late 1968 (Hearings, pages 132-134) and originally had as their purpose the submission by Zelmanowitz of information relating to the indictment and trial of Anthony DeCarlo, once this information was given, representatives of the government continued to extract from Zelmanowitz further information regarding other potential criminal defendants. As Zelmanowitz noted:

"[Once I had gone] before the grand jury where indictments were handed down and Angelo DeCarlo, Joseph Polvorino, Daniel Cerere and others were indicted . . . . *Instead of immediately being furnished with the documentation necessary for relocation, an intensive interrogation started to further see what*

value I could be in building additional cases, including cases for the IRS." (Hearings, pages 135-136, emphasis supplied).

As a result of information developed through these and subsequent interrogations, including Zelmanowitz' testimony at the DeCarlo trial and thereafter intensive one and one-half to two month questioning in Washington, D.C. (Hearings, page 137), the government indicated the petitioners in this case. Indeed, the United States Attorney testified at the hearing on petitioners' new trial motion:

> "And we never had any information or detail concerning the background of the Salerno case until after he [Zelmanowitz] began to reveal it on the stand in the DeCarlo case, as he so testified in the DeCarlo case." (N. p. 130, cross-examination).

Zelmanowitz' expectation of favored treatment by means of the carrying out of these "promises" persisted throughout the 1968-1973 period. His concern, in the earlier part of this period, with the implementation of these promises has been well stated by the United States Attorney. Mr. Stern testified that, in spite of his telling Zelmanowitz that any prior "promises," if made, could not, so far as they related to IRS matters, be enforced, Zelmanowitz nevertheless persisted in insisting on their enforcement. As he stated:

> "I so told Zelmanowitz repeatedly and I might add *ad nauseam* long before he took the stand in the DeCarlo case—in the DeCarlo case." (N. Page 130, emphasis supplied.)

Yet these persistent denials of any power to enforce any alleged promises given in 1969 and 1970 did not quiet Mr.

Zelmanowitz' expectations of their fulfillment. He testified at the Senate Hearings that once his new identity as Paul Maris, California businessman, was successfully challenged and his true identity revealed in late 1972 or early 1973, he complained to the government about its breach of promise:

> "After this disclosure and *much to my shock and disbelief,* the Internal Revenue Service proceeded to enforce the original lien that had been placed against me in 1969, *contrary to the agreements we had spoken of.*" (Hearings, page 146, emphasis supplied.)

It should also be noted, with regard to the alleged promise of treatment in a manner analogous to immunity, that although Zelmanowitz did not receive technical immunity as he pled guilty to counts I-IX and was sentenced in *United States* v. *Salerno,* his concurrent sentences of three years on each count were suspended and he was placed on concurrent three-year probation on each count (Written Judgment and Order of Probation of April 19, 1973). He was thus, in fact, treated in a manner essentially equivalent to receiving immunity, as he was sentenced in such a way as to receive no prison term or fine, although, by his own testimony and admission, he was a persistent and pervasive multiple offender.

Zelmanowitz' allegation of having received "promises" of lenient treatment were known to the government prior to the Salerno trial. As the United States Attorney, stated under oath:

> ". . . I have reason to believe that Mr. Zelmanowitz in his testimony before the United States Senate [*sic*] was referring to some conversations which he claims to have had with the then United States Attorney

> David M. Satz and his First Assistant, Donald Horowitz..... In respect to his [Zelmanowitz's] claim that such a promise had been made my predecessor as United States Attorney [Mr. Lacey]—my then Chief —made an effort to find out whether or not if there was such a promise, it could be enforced.[*] He was informed it could not be. He so informed Mr. Zelmanowitz—" (N. p. 123, direct examination, p. 130, cross-examination.)

If such a promise had in fact been made by prior members of the United States Attorney's Office, it "must be attributed, for these purposes, to the Government" and a classic *Giglio* situation results. *Giglio* v. *United States,* 405 U.S., at 154. Moreover, by failing to inform petitioners of this extensive history of alleged promises involving three separate United States Attorneys, the government effectively limited the ability of the petitioners to cross-examine Zelmanowitz with regard to this critical issue of credibility (see, by way of analogy, *United States* v. *Migliorino,* 238 F. 2d 7, 10-11 (2d Cir. 1956)), as well as creating a "false impression" of Zelmanowitz' motivation in testifying, thereby violating defendants' right to due process. *United States* v. *Ott,* 489 F. 2d 872 (7th Cir. 1973).

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* This statement leads to the question—if such a promise was never contemplated by the government, why would it need to inquire as to whether it could possibly be enforced? Compare *Giglio* v. *United States,* 405 U.S. at 153, fn. 4.

II. PETITIONERS WERE DENIED SUBSTANTIAL DUE PROCESS OF LAW AND A MEANINGFUL HEARING BY THE REFUSAL OF THE DISTRICT COURT TO REQUIRE THE PRODUCTION BY THE GOVERNMENT OF THE CHIEF PROSECUTION WITNESS AT THE EVIDENTIARY HEARING HELD ON PETITIONERS' MOTION FOR NEW TRIAL UPON NEWLY DISCOVERED EVIDENCE, WHERE BOTH THE PETITIONERS AND THE GOVERNMENT SERIOUSLY QUESTIONED THE CREDIBILITY OF SAID WITNESS FOLLOWING HIS POST-TRIAL TESTIMONY REGARDING THIS CASE BEFORE A SENATE COMMITTEE, AND THE REFUSAL TO REQUIRE THE PRODUCTION OF SAID WITNESS WAS IN VIOLATION OF THIS COURT'S RULING IN DEMARCO V. UNITED STATES, 415 U.S. (1974).

The petitioners were denied substantial due process of law by the refusal of the district court to require the production of the chief prosecution witness for examination at an evidentiary hearing on the petitioners' motion for new trial upon newly discovered evidence where both the petitioners and the government had seriously questioned the credibility of that witness as a result of his post-trial testimony regarding this case before a Committee of Congress.

Petitioners, in their motion for new trial upon newly discovered evidence, seriously questioned the trial credibility of the chief prosecution witness, Zelmanowitz, on the basis of said witness' Senate hearing testimony on July 13, 1973. As set forth *supra* in this petition with respect to the first question presented, Zelmanowitz' Senate hearing testimony clearly reveals that *before, at, and after the time of the Salerno trial in 1972, he was relying on the fulfillment, by the government, of certain promises alleged to have been made to him by the government in exchange for his testimony against certain defendants possibly*

including the petitioners in this proceeding. However, when questioned by the district court at the time of the trial, he flatly denied the existence of any such promises. Furthermore, during his Senate testimony, Zelmanowitz declared under oath that he had known for several weeks prior to his appearance at the trial that he could not identify the chief defendant, Anthony Salerno, as one of the persons with whom he had conspired, and that he had so informed the prosecutor prior to his courtroom appearance. In contrast, at the trial, Zelmanowitz maintained that he realized only on the day of his appearance in court, that the defendant Salerno was not a co-conspirator with him.

In the hearing on the motion for new trial, the government argued the factual truthfulness of Zelmanowitz's trial testimony (which was wholly uncorroborated) but strongly attacked his post-trial credibility in his Senate appearance. As noted above, the government gainsaid the possibility of any promise of immunity by the fact that Zelmanowitz did plead guilty and did receive a sentence. With equal vigor, the government denied discussing the issue of Salerno's identification with Zelmanowitz at any time before trial, denied showing him any photographs of Salerno prior to trial, and insisted that their first knowledge of Zelmanowitz's professed inability to identify Salerno came on the day of Zelmanowitz's trial testimony. As the government insisted, Zelmanowitz's testimony at trial had been truthful, but thereafter:

> "At the time [of the Senate hearings, approximately nine months after Zelmanowitz's trial testimony] Mr. Zelmanowitz was obviously resentful of the Justice Department and the Internal Revenue Service. His testimony, before the Senate must be viewed with great caution . . . . the veracity of Mr. Zelmanowitz's testimony before the Senate sub-committee is, to say the

least highly questionable." Brief in Opposition to Defendants' Motion for a New Trial, Pages 6, 8-9.

The issue of the credibility of the chief prosecution witness was clearly joined with regard to the following two questions:

1. Did Zelmanowitz testify at trial with the expectation that his testimony would result in the government fulfilling certain promises allegedly made to him?

2. Did Zelmanowitz know prior to trial that he could not or would not identify defendant Salerno as a co-conspirator and did he so inform the government prior to trial?

Since the Senate hearings were not adversary in nature, Zelmanowitz was not cross-examined therein with regard to the veracity of his testimony (see Senate Transcript, Ex. C-2, Hearing of New Trial Motion of October 30, 1973). At the hearing on defendant's new trial motion, the United States Attorney and two Assistants testified that they had made no promises to Zelmanowitz, but they were unable to show that Zelmanowitz might not have relied on the belief, mistaken or not, that he had received certain government promises from prior members of the United States Attorney's Office. Similarly, the prosecutors denied that, to the best of their knowledge, any member of the District Attorney's staff had shown pictures of the defendant Salerno to Zelmanowitz or that Zelmanowitz had communicated to said staff, prior to trial, his professed inability to identify Salerno. However, the prosecutors could not demonstrate, at the hearing on defendants' motion for new trial, that Zelmanowitz did not know, prior to trial, that he could not identify the defendant Salerno or that he had not communicated this knowledge to a possible representative of the United States not directly on the staff of the United States Attorney.

Clearly, the only way for the district court to have properly chosen between Zelmanowitz's trial testimony and his Senate testimony on these conflicting points would have been for the district court to require his testimony at the hearing on defendants' motion so that he could have been examined by both the United States and the defendants with regard to these critical questions.

Moreover, since the key issue, underlying the factual disputes discussed above, which was to be decided at the evidentiary hearing on petitioners' new trial motion was the *credibility* of the chief government witness, it was essential that the district court evaluate the *demeanor* of the said witness as he answered questions put to him by both petitioners, who challenged the veracity of his trial testimony, and by the government, which questioned the truthfulness of his post-trial testimony at the Senate hearings. As this court has noted in this regard in *Townsend* v. *Sain*, 372 U.S. 293, 322 (1963):

> "[w]here an unresolved factual dispute exists, *demeanor evidence* is a *significant factor* in *adjudging credibility*. And questions of credibility, of course, are *basic to resolutions of conflicts in testimony.*" (Emphasis supplied.)

and furthermore that, in order to satisfy the requirements of a full and fair evidentiary hearing:

> ". . . the petitioner . . . must be given the opportunity to present other testimonial and documentary evidence [in addition to the court records below] relevant to the disputed issues" (*Townsend* v. *Sain, supra*, 372 U.S. at 322).

In this case, Gerald Martin Zelmanowitz was the chief prosecution witness. Without his testimony, petitioners

could not have been convicted. Petitioners insisted before and at the hearing on their new trial motion that he be produced for examination at said hearing as they contended his trial testimony was incomplete, seriously misleading, and as a result, severely tainted. The government, while insisting that his trial testimony was truthful, attacked the veracity of his post-trial testimony. Surely, the production of this witness at the new trial motion hearing so as to permit cross-examination and observation of his demeanor was indicated, if not compelled, in this case.

Barring this clarification of the issue of the credibility of the chief prosecution witness, his testimony remains highly suspect—either because he lied at trial or because he lied at the Senate hearings, or both. As such, the position of Zelmanowitz is strikingly similar to that of Joseph D. Mazzei, the chief government witness in *Mesarosh* v. *United States,* 352 U.S. 1, 77 S. Ct. 1 (1956). In that case, Mazzei's trial testimony was supported by the United States as entirely truthful and credible but his post-trial testimony in other forums, including the Senate Permanent Sub-Committee on Investigations, was considered, by the United States, to be open to "serious . . . doubt." *Mesarosh* v. *United States,* 352 U.S. at 4. As a result of this disclosure by the government, this Court reversed the conviction of the defendants and remanded the case to the district court for a new trial *not on the ground that this witness was shown to have lied at trial but on the grounds that the doubtful truthfulness of the witness' post-trial testimony indicated "the unreliability of this Government witness" and that such unreliability so tainted the testimony of the witness that "there can be no other just result than to accord petitioners a new trial."* *Mesarosh* v. *United States,* 352 U.S. at 9. Similarly, in this case, the unreliability of the witness Zelmanowitz has been so well demonstrated by

both the defendants and the government that his testimony must be viewed as so tainted that the "dignity" of the judicial process may well require that defendants be given a new trial. At the very least, however, the defendants were entitled to a full opportunity to examine Zelmanowitz at the hearing on their motion for new trial. The refusal by the District Court to allow such an examination constitutes error. See *Mesarosh* v. *United States*, 352 U.S. 1, 9, 14; *cf.* Justice Holmes, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 470, 48 S. Ct. 564, 575 (1928).

More recently, on March 18, 1974, this Court summarily remanded for a district court hearing *DeMarco* v. *United States*, No. 5684, October Term, 1973, 415 U.S. , with regard to the question of "[D]id the Court of Appeals err in refusing to remand the petitioners' case to the district court for an adversary hearing on his allegations of prosecutorial misconduct" (Petition, p. 2). The Court emphasized in its *per curiam* opinion the importance of an "evidentiary hearing"* to determine whether there had been a plea bargain concluded between a government witness and the government prior to petitioners' trial and noted that:

> "Unquestionably, had there been a promise to the witness prior to his testimony, *Giglio* v. *United States*, 405 U.S. 150 (1972), and *Napue* v. *Illinois*, 360 U.S. 264 (1959), would require reversal of petitioner's conviction." 42 U.S.L.W. 3520.

Thus this Court ordered that the judgment of the Court of Appeals for the Seventh Circuit be vacated and that the

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* See also this Court's recent action, and that of the court below, in emphasizing the importance of a "full and fair" hearing in *Rose* v. *Ray*, U.S. No. 73-1525, 42 L.W. 3663, cert. denied June 3, 1974), ruling below: 491 F. 2d 285 (6 Cir. 1974).

case be remanded thereto with instructions to remand the case to the district court for an evidentiary hearing on the issue of when the alleged plea bargain was concluded.

This case is strikingly similar to *DeMarco, supra,* in its allegation of plea bargaining, but it may be distinguished therefrom by the fact that, here, an adversary hearing *of sorts* on petitioners' motion for new trial upon newly discovered evidence was held by the district court. However, despite the several specific requests of petitioners, the key government witness, Zelmanowitz, whose production the government conceded was within its and not the petitioners' control, was not produced at this hearing. Thus the only "evidence" introduced by the government at said hearing was its denial that the United States Attorney, or any of his staff members, prosecuting the case-in-chief, had offered a plea bargain to Zelmanowitz in return for his testimony. Such self-serving denials by the government, petitioners contend, form an insufficient basis to satisfy the requirement of an "evidentiary hearing." *Cf. Kolod* v. *United States,* 390 U.S. 136, 137 (1968); *Herman* v. *Claudy,* 350 U.S. 116, 118-119 (1956); see, *e.g., Service* v. *Dulles,* 354 U.S. 363 (1957); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959) *Greene* v. *McElroy,* 360 U.S. 474 (1959). This is especially true given the admission by the government at the district court hearing on petitioners' new trial motion that the government witness Zelmanowitz may have believed he had received a plea bargain from the prior United States Attorney and that, therefore, the United States Attorney at the time of trial had to emphasize "*ad nauseam*" that, even if Zelmanowitz had received such a promise, the current United States Attorney did not have the authority to see to it that it was enforced.

The district court refused petitioners' requests that Zelmanowitz be produced (N. pages 96, 156) and decided the

crucial issue of credibility without ever hearing from or observing Zelmanowitz. As such, the district court failed to grant petitioners a full and fair evidentiary hearing on their new trial motion and thereby denied petitioners substantial due process.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

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June 14, 1974.

Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

May 31, 1977

Nos. 74-1017/18/19

UNITED STATES OF AMERICA

v.

ANTHONY SALERNO, ANGELO ROSSI, JR., GILBERT LEE BECKLEY, JOSEPH GREEN, HOWARD SILVERMAN, WILLIAM SILVERMAN, JACK MACE, LARRY BRESSLER, GERALD MARTIN ZELMANOWITZ

ANGELO ROSSI, JR., Appellant — No. 74-1017
HOWARD SILVERMAN, Appellant — No. 74-1018
WILLIAM SILVERMAN, Appellant — No. 74-1019

(D. C. Criminal No. 116-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)
on May 30, 1974
Before KALODNER, ROSENN and HUNTER,
Circuit Judges

MORRIS M. GOLDINGS, Esquire,
HERBERT D. FRIEDMAN, Esquire,
Boston, Massachusetts,
Attorneys for Appellants.

JONATHAN L. GOLDSTEIN, Esquire,
United States Attorney,

RICHARD S. ZACKIN, Esquire,
Assistant United States Attorney,
Newark, New Jersey,
Attorneys for Appellee.

JUDGMENT ORDER

Upon consideration of the appellants' contentions that:

(1) The district court erred in refusing to require the examination of the chief prosecution witness at the hearing on defendants' motion for new trial upon newly discovered evidence and,

(2) The district court erred in refusing to grant a new trial to defendants on the basis that allegedly newly discovered evidence revealed that the chief prosecution witness had a continual expectation of lenient treatment based upon alleged promises by the United States, in return for his testimony against the defendants, and the United

States, although aware of its witness' expectation, did not reveal these circumstances to the defendants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court:
MAX ROSENN,
Circuit Judge

Attest:
THOMAS F. QUINN,
Clerk

Appendix "B"

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CRIMINAL No. 116-70

UNITED STATES OF AMERICA,

v.

ANTHONY SALERNO ET AL.

Order

[Filed October 30, 1973.]

This matter having been opened to the court on the motion of defendants Angelo Rossi, Jr., William Silverman, and Howard Silverman for a new trial based upon newly discovered evidence, that is, certain testimony of Gerald Martin Zelmanowitz before the United States Senate Permanent Sub-Committee On Investigations on July 13, 1973, and the Court having considered that testimony and the testimony of Gerald Martin Zelmanowitz at the trial of defendants on Criminal Indictment No. 116-70, and the Court having further considered the oral argument and briefs of counsel for the defendants and counsel for the United States, and the Court having taken the testimony of Herbert J. Stern, United States Attorney for the District of New Jersey, David R. Hinden, Assistant United States Attorney for the District of New Jersey, and Richard M. Langway, Esquire, and the Court having orally given its reasons in open Court and having reserved the right to set forth the basis of its conclusion in greater detail and having thereafter supplemented its findings and reasons, holds

1. There was no prosecutorial misconduct on the part of the United States and its representatives at the trial of

defendants on Criminal Indictment No. 116-70, either with regard to the displaying of photographs of codefendant Anthony Salerno to Gerald Martin Zelmanowitz prior to trial or with regard to alleged promises made to Gerald Martin Zelmanowitz by the United States and its representatives in exchange for the testimony of Gerald Martin Zelmanowitz at the trial of defendants in this matter;

2. The testimony of Gerald Martin Zelmanowitz before the United States Senate Permanent Sub-Committee On Investigations on July 13, 1973 does not constitute newly discovered evidence of the type which entitles defendants to a new trial either under the "Berry" test as set forth in *United States* v. *Bertone*, 249 F. 2d 156, 160, (3d Cir. 1957), or under the "Larrison" test as set forth in *Larrison* v. *United States*, 24 2d 82, 87 (7th Cir. 1928).

3. With regard to the "Larrison" test, the Court is not reasonably well satisfied that the testimony given by Gerald Martin Zelmanowitz at the trial of defendants in this matter is false.

4. Zelmanowitz' testimony at trial regarding his then status (as having pled guilty to charges of the Indictment), was true despite any other testimony he may thereafter have given before the United States Senate. The testimony at trial having been true, the United States cannot be charged with any obligation or duty respecting such testimony and therefore breached no such duty or obligation. See *Giglio* v. *United States*, 405 U.S. 150 (1971).

5. No promises concerning the witness Zelmanowitz' tax difficulties were made by the United States in exchange for Zelmanowitz' testimony in the instant trial.

6. Whether or not Zelmanowitz was shown or saw photographs of the defendant Anthony Salerno prior to the commencement of trial, the United States did not know that the witness Zelmanowitz was unable to identify Salerno

until Zelmanowitz testified to that fact in open Court during the course of trial.

7. Such evidence as the defendants characterize or deem to be "new evidence" is at most impeaching and not material to the issues involved.

8. Such evidence would not in a new trial properly produce an acquittal.

9. There are no facts and there is no basis upon which this Court can conclude that the United States and its representatives did not fully comply with their abligations under 18 U.S.C. § 3500 at the trial of the defendants in this matter, and I therefore affirmatively hold (from the record of the trial, the production of § 3500 material, and the inquiries that then and there took place), that the United States fully complied with its obligations under the aforesaid statute.

10. Under the facts and records as developed at the trial and at the instant hearing, the defendants have not met their burden under either *United States* v. *Bertone*, 249 F. 2d 156 (3d Cir. 1957) or *Larrison* v. *United States*, 24 F. 2d 82 (7th Cir. 1928).

It is therefore on this 14th day of November, 1973,

ORDERED, that the motion of defendants Angelo Rossi, Jr., William Silverman and Howard Silverman for a new trial be and the same is hereby denied; and it is further

ORDERED, that the United States having voluntarily produced under direction of the Court so much of the 18 U.S.C. § 3500 material as was the subject of subpoena and/or motion to produce, the same are hereby quashed and denied as being moot.

LEONARD I. GARTH, U.S.C.J.
(sitting by designation as United States District Judge pursuant to 28 U.S.C. § 291(c)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CRIMINAL No. 116-70

UNITED STATES OF AMERICA
v.
ANTHONY SALERNO ET AL., Defendants.

Opinion.

Newark, New Jersey,
November 13, 1973.

By: The Honorable LEONARD I. GARTH, U. S. C. J. (T/A)

THE COURT: On October 2, 1972, Gerald Zelmanowitz pled guilty to Indictment No. 116-70 which charged Zelmanowitz, Anthony Salerno, Howard Silverman, William Silverman and Angelo Rossi, Jr., and others with conspiracy and substantive offenses involving stolen securities.

Thereafter, trial was commenced on October 11, 1972, against the defendants, Salerno, the two Silvermans and Rossi (the other defendants having been severed and/or having pleaded guilty). Midway through the trial the Government called the defendant Zelmanowitz to testify on its behalf, and during the initial stages of his testimony he requested a recess. After the recess, the United States agreed to sever the defendant Salerno on the grounds that Zelmanowitz during the recess had informed the United States Attorney that the individual in court, named as the defendant Salerno, was not the individual with whom he had acted and he could not identify him as such. Subsequently, the indictment was dismissed as to Salerno.

The jury convicted the defendants remaining on trial. Sentence was imposed. An appeal was thereafter taken and

the convictions were affirmed. *United States* v. *Salerno et al.*, Nos. 73-1195, 1196, 1197 (3d Cir. Sept. 5, 1973).

Some time after the trial, Zelmanowitz was called to testify before the Senate Investigating Committee which was investigating the subject of stolen securities. A transcript of that testimony before the Senate Hearing Company was obtained by the defendants Rossi and the two Silvermans and forms the predicate for their motion for a new trial under Federal Rule of Criminal Procedure 33. They assert that Zelmanowitz' testimony before the Senate was at variance with the testimony given during the trial of Indictment 116-70.

Attached to this Opinion as an exhibit (A) are Pages 2 through 11 of the defendants' motions incorporating the alleged inconsistencies between Zelmanowitz' testimony at trial and before the Senate.

At the hearing of the motion for the new trial, testimony was taken with respect to certain of the allegations made by the defendants. The United States Attorney, Mr. Stern, and two Assistants, Mr. Langway and Mr. Hinden, were called to the stand by the Court and testified under oath.

At the conclusion of the hearing, I denied the motion for a new trial in an oral statement from the bench in which I did not go into particular detail, nor did I recap the various arguments or colloquy had during the oral argument on the motion. Rather, I held that either under the *Berry* test or the *Larrison* test, the defendants had not carried their burden.

At the conclusion of the proceedings, I reserved the right to set forth with greater particularity my reasons for denying the defendants' motions, including therein whatever findings of fact and conclusions of law I thought appropriate. This supplemental opinion incorporates such findings of fact and conclusions of law and has been prepared

in accordance with the reservation noted at the conclusion of the hearing.

It should be noted in the first instance that a motion such as brought by the defendants is to be granted only with the greatest of caution. *United States* v. *Kozak,* 438 F. 2d 1962 (3d Cir. 1971) *cert. den.* 402 U.S. 996 (1971).

A motion for new trial on the basis of newly discovered evidence may be granted only of the following conditions are met:

(a) Evidence must be discovered since the trial;

(b) Evidence must not be merely cumulative or impeaching;

(c) Evidence must be material to the issues involved;

(d) Evidence must be of such a nature that in a new trial it would probably produce an acquittal;

(e) The moving party must show diligence in the attempt to procure the newly discovered evidence. *United States* v. *Bertone,* 249 F. 2d 156, 160 (3d Cir. 1957); *United States* v. *Meyers, et al,* 72-2069, 2070, 2071 (3d Cir.) filed August 31, 1973; *United States* v. *Zali Fried,* Docket No. 73-1776 (2d Cir.) decided October 12, 1973.

There is no question raised by the Government that the first and last conditions as above set forth have been met, and I so hold.

Whether or not to grant an evidentiary hearing on such a motion is a matter of discretion for the trial court. *United States* v. *Crowder,* 351 F. 2d 101 (6th Cir. 1965).

I

With respect to the issue raised as to Zelmanowitz' testimony before the Senate that he was to be granted immunity from prosecution in the (Salerno) case:

The defendants here do not come within the rule of *Giglio* v. *United States,* 405 U.S. 150 (1972), for in the instant case Zelmanowitz had not only been prosecuted *prior* to the time that the Salerno trial opened and he testified, but in fact had pled guilty approximately a week prior to the commencement of trial. *Thereafter in fact,* Zelmanowitz, testimony before the Senate was indisputedly in error, as there was not and could not have been an agreement as to immunity from prosecution in the Salerno case.

It was brought out during Zelmanowitz' cross-examination during trial that he had pleaded guilty prior in time to the commencement of the trial. Accordingly, if we are not in the special *Giglio* situation, then the general rule would apply that newly discovered evidence merely impeaching the credibility of a prosecution witness is not grounds for a new trial. *United States* v. *Kozak,* supra, at 106.

This is not to say that I believe that the statement made by Zelmanowitz before the Senate was a statement "impeaching the credibility of Zelmanowitz" but even if it were, it would not furnish grounds for a new trial.

II

With respect to the assertion by the defendants that the testimony of Zelmanowitz before the Senate concerning his tax problems and "promises" made in connection therewith by the Government were relied upon by him to induce him to testify:

A reading of the full Senate Hearings clearly and unequivocally discloses that this testimony referred to Zelmanowitz' appearance as a witness in *United States* v. *DeCarlo,* a case tried in the District Court of New Jersey commencing in 1969, some three years prior to the indict-

ment and trial of *United States* v. *Salerno*. On that ground alone the defendant's claim must fall. Accordingly, there is no "newly discovered evidence" relating to *United States* v. *Salerno* with respect to any promises made to induce testimony in *United States* v. *Salerno* as it may relate to Zelmanowitz' tax problems. In addition, however, I find that there was no such promise made to Zelmanowitz.

The United States Attorney, Mr. Stern, explained fully, and I accept his testimony, that both he and his predecessor, then United States Attorney Lacey, now United States District Court Judge Lacey, explained to Zelmanowitz prior to Zelmanowitz's testimony in DeCarlo that *not* only would they *not* assist him with respect to his tax difficulties but that even if they desired to help him they could not so assist him in connection with these matters.

III

Photographs and identification of Salerno:

Even if one were to grant that there were inconsistencies in the testimony given by Zelmanowitz before the Senate Committee and at trial respecting when and if he had seen photographs of the defendant Salerno, I do not find such inconsistencies to be material or to satisfy the requirements under either the *Berry* or *Larrison* tests for the granting of a new trial.

1. The testimony at trial was to the effect that Zelmanowitz could not remember having been shown photographs of Salerno;

2. Even if it be taken that he did or was shown photographs, the fact remains he could not identify Salerno;

3. I am satisfied and I find as a fact that the first time that the United States learned that Zelmanowitz could not identify the individual in court as the Salerno with whom

he dealt was when Zelmanowitz took the stand and asked for a recess after having seen Salerno in court.

Accordingly, I need not inquire as to what duty the United States would have had to these defendants, i.e., Rossi and the two Silvermans, to divulge to them, or to take action with respect to them, even had Zelmanowitz imparted information as to his failure to identify Salerno to the United States prior to the commencement of trial.

The legal arguments made by the Silvermans and Rossi before the Court of Appeals and before the Trial Court have been ruled upon and cannot form any basis as to which this Court will grant a new trial. The cases cited by the defendants, i.e., *United States* v. *Rispo*, 460 F. 2d 965 (3d Cir. 1972) and *United States* v. *Lusterino*, 450 F. 2d 572 (2d Cir. 1971) are cases involving informers and are distinguishable in that the Government in those cases did not admit the "sham"; (the Government had permitted sham or informer defendants to testify, thereby painting a "false picture") and that "sham" was perpetrated throughout the entire trial.

Here I find there was no sham; that the Government did not know that the individual defendant Salerno would not and could not be identified by Zelmanowitz until Zelmanowitz took the stand, and the moment that that lack of identification was brought to the attention of the Government, action was taken by both the Government and the Court to call this to the attention of the other defendants and the jury. I make this finding (as to the time of disclosure to the Government of Zelmanowitz' failure of identification) not only by virtue of the testimony of the two United States Attorneys and Mr. Stern, but by the very improbabilty of the United States having been in possession of that information and yet risking its entire case on the disclosure from the stand by Zelmanowitz. It is not conceivable to me that

the United States would have jeopardized its position and case, by knowing what Zelmanowitz' testimony was to be, and still permitting the disclosure to be made from the witness stand as it was.

Further, Zelmanowitz was cross-examined at great length by the defendants on his failure of identification and this inured to the defendants' credit, rather than to their disadvantage.

IV

With respect to the 3500 material, or the Jencks material:

The basis of this claim is the testimony by Zelmanowitz before the Senate Committee in which the witness mentioned that he was interviewed on several occasions by representatives of the United States. This does not constitute new evidence. The record discloses several interviews which were furnished to the defendants and there is no indication that these 302 (FBI interview) forms reflecting interviews, are not the very ones as to which Zelmanowitz testified before the Senate. Counsel at trial could have interrogated Zelmanowitz, or any other witness at length pinpointing the particular interviews or ascertaining deficiences if any in the 3500 material. They did in fact question Zelmanowitz about such matters, and the transcript—At Pages 1908, 1911-12, 1922-24, 1930-35, 1935-36, 1936-38, 1940, 2007, 2011, 2032-33, 2068, 2093, 2113-2115, 2114—reflects interrogations concerned with interviews, photographs, identifications, and the like. The 3500 material that was furnished is set forth in the transcript on Page 1795.

At the hearing with respect to the issue raised as to 3500 material, the defendants sought an additional period of time during which they could ascertain what 3500 material

had been afforded to the trial counsel for the defendants (Messrs. Cohen and Greenberg) at the time of trial. They also pressed for the divulging of such materials through and by means of a subpoena addressed to the United States Attorney, as to which the United States Attorney responded in an oral motion to quash. Subsequent to the hearing, through informal arrangements, the United States Attorney furnished those materials which he was able to assemble from his files.

It should be noted in this connection that the United States Attorney had represented at the hearing that his trial files had been disassembled; that to his knowledge the 3500 material given to defendants' trial counsel at trial had been retained by them and that he was not certain as to where or whether file copies of such materials were still available. I am satisfied that there has been diligent and good faith efforts made by both defense counsel and the United States Attorney to reconstruct the packet of 3500 materials available to the defendants at trial.

In this connection, an affidavit submitted by defendants' counsel is made part of this record, together with the additional Motion for Order for Production of Exhibits. This latter motion asks for the production of some five items, all of which were marked and produced at trial. They are:

G-15 March 4, 1969—FBI 302(1);
G-16 June 17, 1968—FBI 302(3);
G-16(a) Original 302 (June 17, 1968);
G-17 December 17, 1968—FBI 302(4);
G-19 June 30, 1970—FBI 302(2).

The United States furnished G-15, G-16 and G-17 to the defendants by letter dated November 8, 1973. The item marked G-18, representing an FBI 302 for June 30, 1970, could not be located, and obviously G-16(a) as noted above, forms a part of G-16.

While I do not feel that the claim made by the defendants on their motion for a new trial addressed to the issue of "interviews" and 3500 material is a substantial or meritorious claim, I nevertheless felt that all action should be taken to supply these materials to the defendants for whatever purposes they felt were required. These materials, to the extent available, have now in my view been supplied, and despite the fact that some few of these exhibits may not have been afforded to the present counsel for the defendants by reason of the passage of time or otherwise, I find no basis on that account for the grant of a new trial.

Further, I hold that the claim made by the defendants in this connection is not a proper "new evidence claim." In addition, the defendants, through their trial counsel, had full opportunity to inquire into the existence and substance of any FBI reports, interviews, and other 3500 material, and by electing to conduct their inquiry in the manner reflected by the trial transcript, are now precluded from any further relief in this connection. Certainly they are precluded from the relief sought on this present motion. I hold that the United States at the time of trial fully complied with its obligation under 18 U.S.C. Section 3500.

V

The last claim made by the defendants is to the effect that there was an attempt to "chill" Zelmanowitz' testimony before the Senate, and that the Marshals could not give Zelmanowitz protection in Washington, D. C., and wanted him out of that geographic area. This does not fall within any classification of newly discovered evidence which would warrant a new trial.

Accordingly, I hold that under either test as aforesaid, the evidence that could most charitably be called new evi-

dence was merely and at best impeaching. I find that the evidence presented by the defendants was not material to the principal issues involved and that even had it been presented at this trial, in light of the minimal nature of such evidence, and in light of the overwhelming attack on Zelmanowitz' credibility in which he had admitted at trial that he had cheated and defrauded the Government and that he had engaged in dishonesty and chicanery, it would have had little effect and could not have produced an acquittal. *See United States* v. *Bertone,* supra.

Furthermore, I hold that even under the stricter scope of the *Larrison* rule, petitioners are not entitled to a new trial, since I do not believe that the jury *might* have reached a different conclusion had it had the benefit of Zelmanowitz' later remarks. *See Larrison* v. *United States,* 24 F. 2d 82, 87 (7th Cir. 1928).

I am satisfied and I so hold that even if the testimony given by Zelmanowitz at trial respecting the Salerno photographs was false (and I am not reasonably well satisfied that such testimony was false), that nevertheless the jury would not have reached a different conclusion; that it could not have affected these defendants; and that it would not have resulted in an acquittal.

Accordingly, under the facts and the record in this case, whether I apply *Bertone* (*Berry*) or *Larrison* as the applicable test, the defendants have not met their burden. The motion for a new trial is therefore denied.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1874

ANGELO ROSSI, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1974. The petition for a writ of certiorari was filed on June 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners are entitled to a new trial because of the alleged failure of the government to disclose that a witness in the instant case had been granted immunity in another case (*United States* v.

DeCarlo, 458 F. 2d 358 (C.A. 3)) tried several years before the instant prosecution.

2. Whether the trial court abused its discretion at a post trial hearing (on a motion for a new trial on the ground of newly discovered evidence) when it refused to call a witness whose testimony before a Senate Subcommittee appeared to contradict his testimony at trial on the peripheral issue of when he first became aware that he could not identify a codefendant who was severed during the trial.

STATEMENT

In October of 1972, following a jury trial in the United States District Court for the District of New Jersey, petitioners Angelo Rossi, Howard Silverman and William Silverman were found guilty of conspiring to transport stolen securities in interstate commerce (count 1), in violation of 18 U.S.C. 371. Petitioner Rossi was also found guilty of various substantive counts (counts 3, 6, 7, 8 and 9) charging the transportation of stolen securities in interstate commerce, in violation of 18 U.S.C. 2 and 2314. Howard Silverman was sentenced to a term of two years' imprisonment and William Silverman to a term of three years' imprisonment. Petitioner Rossi was sentenced to a term of three years' imprisonment, and a fine of $5,000 on count one and one year prison terms on each of counts three, six, and seven, to run consecutively to each other and to the term imposed on count one. In addition, the court sentenced Rossi to two years' probation on counts eight and nine, to begin on the date of Rossi's release on parole. The

court of appeals affirmed, 485 F. 2d 260, certiorari denied, 415 U.S. 994.

On July 13, 1973, the government's principal witness at trial, Gerald Zelmanowitz, testified before the United States Senate permanent sub-committee on investigations. He testified that in exchange for his testimony in the trial of Angelo DeCarlo, see *United States* v. *DeCarlo*, 458 F. 2d 358, the government had indicated that he would receive immunity for the matters about which he testified in that case (S.T. 134; App., *infra*).[1] His testimony before the Senate Subcommittee could also be read to imply that he had been induced to testify against DeCarlo by promises of government intercession on his behalf in a civil suit that he was litigating against the Internal Revenue Service at that time[2] (S.T. 134–135; App., *infra*).

Alleging that this testimony contradicted that given at trial, petitioners requested a new trial on the ground of newly discovered evidence. A post-trial hearing was held, at which the testimony of Herbert Stern, then the United States Attorney for the District of New Jersey, and David Hinden and Richard Langway, Assistant United States Attorneys, was ad-

[1] "S.T." refers to the Senate testimony, "T" to the trial testimony, and "P.T.H." to the testimony at the post trial hearing. We are lodging with the Clerk a copy of the Senate hearing; we have also reprinted certain pages of that hearing as an appendix to this brief.

[2] Petitioners' quotation at the top of page 5 of their petition is not reflected in the transcript of the sub-committee's hearings, from which it purports to come (S.T. 134–135; App., *infra*). Moreover, while the statement arguably accurately paraphrases Zelmanowitz's testimony, the statement does not indicate that Zelmanowitz was referring to the DeCarlo trial, rather than the instant prosecution.

duced. Mr. Stern testified that although Zelmanowitz had requested assistance in tax matters, he had been repeatedly told that it was not possible. Moreover, these discussions had occurred prior to and in connection with the DeCarlo prosecution, not the instant one (P.T.H. 122–125). Mr. Zelmanowitz, who had been relocated for his safety after his testimony against DeCarlo, was not called back as a witness at the post trial hearing.

ARGUMENT

1. Petitioners, relying primarily upon *Giglio* v. *United States,* 405 U.S. 150, contend that they are entitled to a new trial because the government failed to disclose that Zelmanowitz was testifying under an alleged expectation of lenient treatment. Petitioners claim that Zelmanowitz' testimony before the Senate Subcommittee revealed that his testimony in the instant case was influenced by government promises of immunity and intercession on his behalf in tax litigation in which he was involved. Thus, according to petitioners, since the government did not inform them or the jury of these promises, they are entitled to a new trial under *Giglio.* This claim is without merit.

Zelmanowitz' testimony (before the Senate Subcommittee) as to his tax problems, after the instant trial, did not state that any promises had been made him; at most, he implied that the resolution of his tax case was a factor in his decision to testify in the *DeCarlo* case (S.T. 134–135; App., *infra*). Petitioner's claim that Zelmanowitz testified that he had received "assurances that another pending case in which he

was involved would be 'resolved'" (Pet. 5) is misleading, because it refers to the prior *DeCarlo* trial (see footnote 2, *supra*). Moreover, Mr. Stern testified at the post trial hearing that in fact Zelmanowitz' request for help in his tax case had been unequivocally denied (P.T.H. 122–125). The trial court was thus clearly warranted in finding that the government had made no promises concerning Zelmanowitz' tax difficulties in exchange for his testimony in the instant case (Pet. App. B, 30); and such findings should not be set aside unless they are "wholly unsupported by evidence." *United States* v. *Johnson*, 327 U.S. 106, 111–112.

Petitioner's claim that Zelmanowitz was testifying under a promise of immunity is similarly without factual basis. His testimony (before the Senate Subcommittee) that "I would be treated in a manner that I would receive immunity and not be prosecuted for these disclosures" (S.T. 134; App., *infra*) is accurate when it is placed in the context of the *DeCarlo* trial, to which he was referring. He was not promised immunity for his testimony in the instant case, and had in fact pled guilty to his part in the conspiracy prior to trial (see Pet. App. B, 34–35).

Petitioners' reliance on *Giglio* is thus misplaced. There, this Court held that where one Assistant United States Attorney had promised a co-defendant that he would not be prosecuted if he testified and a second prosecutor had allowed that witness to testify that no promises had been made in exchange for his testimony, a new trial was necessary. In the instant case there were no promises made by the government in

exchange for the witness' testimony. The fact that Zelmanowitz had received immunity for his testimony in a different case, prosecuted some two years before, clearly does not bring this case within the ambit of *Giglio*. As this Court noted, a new trial is not automatically required "whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict * * *' " (*Giglio, supra,* 405 U.S. at 154).

2. Petitioners contend that they were denied Due Process of Law by the refusal of the court to require the production of Zelmanowitz at the post trial hearing. There is no merit to this claim.

During the initial moments of Zelmanowitz' testimony at trial, he indicated that he could not identify the then co-defendant Anthony Salerno. As a result, Salerno's case was severed and the trial of the other defendants proceeded. On cross examination, Zelmanowitz stated that he could not remember having been shown photographs of Salerno (Pet. App. B, 36). Before the Senate Subcommittee the following colloquy occurred:

> Mr. FELDMAN: Can you please explain why in one of those cases you failed to identify Anthony Salerno?
>
> Mr. ZELMANOWITZ: I notified the Assistant U.S. Attorney prosecurint [sic] the case that I didn't know the person known to be Anthony Salerno as the person I knew and was in business with. For whatever reason they proceeded with it. A couple of days before the trial, in preparation for it, I again was shown photographs and was not able to identify him as such.

> In the courtroom I stated this was not the Anthony Salerno I did business with. [S.T. 224; App. 14.]

In order to clarify Zelmanowitz' contradictory statements on this collateral point the U.S. Attorney as well as the two assistants who handled the prosecution were put under oath at the post trial hearing, and were questioned by the judge who presided over the trial, and cross examined by defense counsel. All three of the prosecutors emphatically testified that they first learned that Zelmanowitz would not be able to identify Salerno when it occurred at trial (P.T.H. 125, 144, 149).

The court then made the following finding (Pet. App. B, 37–38):

> Here I find there was no sham; that the Government did not know that the individual defendant Salerno would not and could not be identified by Zelmanowitz until Zelmanowitz took the stand, and the moment that that lack of identification was brought to the attention of the Government, action was taken by both the Government and the Court to call this to the attention of the other defendants and the jury. I make this finding (as to the time of disclosure to the Government of Zelmanowitz' failure of identification) not only by virtue of the testimony of the two United States Attorneys and Mr. Stern, but by the very improbabilty of the United States having been in possession of that information and yet risking its entire case on the disclosure from the stand by Zelmanowitz. It is not conceivable to me that the United States would have jeopardized its position and case, by knowing what Zelmanowitz' testimony was to be, and still per-

mitting the disclosure to be made from the witness stand as it was.

Further, Zelmanowitz was cross-examined at great length by the defendants on his failure of identification and this inured to the defendants' credit, rather than to their disadvantage.

In the situation of this case, where the court had ample opportunity to observe the witness' demeanor at trial, where the witness had been relocated for his protection, and where the point at issue is at best collateral to the already completed trial, the trial judge acted within his discretion in not recalling Zelmanowitz. Cf. *United States* v. *DeSapio,* 456 F. 2d 644 (C.A. 2), certiorari denied, 406 U.S. 933. *DeMarco* v. *United States,* 415 U.S. 449, upon which petitioners rely, is not to the contrary. The Court there held that where a factual question (whether a plea bargain, which admittedly took place, occurred prior to or after a co-defendant's testimony) is dispositive of the issue whether a new trial is necessary, that factual issue should be considered by the district court rather than the court of appeals. The holding of *DeMarco* was followed in the instant case. Petitioners' reliance on *Mesarosh* v. *United States,* 352 U.S. 1, is also misplaced. There the witness' credibility was "wholly discredited" by the subsequent revelation of a series of bizarre untruths he had told under oath. By contrast, in the instant case the witness' subsequent testimony, although contradictory on a peripheral element (when he was first aware he could not identify a codefend-

ant), reaffirmed the substantive content of his testimony as it dealt with the role of organized crime in the trafficking of stolen securities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Pages 132–135, 224–225 from the stenographic transcript of Hearings before the United States Senate, Permanent sub-committee on investigations, on July 13. 1973:

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* * * * *

In late 1968 I was arrested in Miami Beach, Florida in the process of trying to sell some stolen securities. I was brought before a U.S. Magistrate where bond was made but I was restricted and held in custody because I had to be delivered to the Federal court in New Jersey for leaving that jurisdiction while I was under a previous bond. Over a period of 30 days I journeyed from Miami to Newark with Federal marshals. At the end of this journey, when I finally arrived in Newark, I was approached by two agents of the FBI. I was very quickly and briefly told of a situation where the FBI had received a letter from a Mr. Louis Saperstein. This letter stated that Mr. Saperstein had borrowed large sums of money from Angelo DeCarlo—approximately a [133] half-a-million dollars—Daniel Cecere and others; that he had been severely beaten for the failure to pay certain interest and principal payments to them; and that he was in fear for hie life. This letter arrived in the FBI offices approximately at the same time that Mr. Saperstein died from poisoning. It was later determined that his death was a suicide, although at the time the FBI believed he had been murdered.

The FBI agents had approached me because Louis Saperstein and I were partners in a firm called Societe de la Bourse. This firm was used primarily for the purchase, sale and analysis of foreign securities in the manner I have de-

scribed. I told the FBI agents that I did not wish to discuss Saperstein's business in relation to DeCarlo, although I was aware of the matter. I did not wish to get involved because of my knowledge of DeCarlo's connection with the mafia and I knew him to be a high-placed figure in organized crime.

At this meeting there was very little time to discuss the matter. They quickly said that things can be arranged; that my safety could be insured. I told them that I would speak to them at some other time but not now and I proceeded to go down into the courtroom where I made bond and eventually went back to my home at 8 Wachtung Road, Short Hills, New Jersey. In approximately 30 days I was again approached by this team from the FBI and many hours were spent in discussing the possibility of my testifying before a closed grand jury and in secrecy.

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At meetings with U.S. Attorneys I was told that if I would testify, certain things could be provided for my safety that (a) I would be helped in relocating myself and my entire family to a site of my choice and at that time we spoke of going to Europe; (b) new identifications would be created for me and my family and a past history of our lives would also be created; and (c) they would provide subsistence to my family during the course of my testimony because I would not be working or have access to my funds, but spending all of my productive time with the Federal Bureau of Investigation and the U.S. Attorney in preparing this case. I would be treated in a manner that I would receive immunity and not be prosecuted for these disclosures.

Additional [sic], at that time I had a suit against the IRS being heard before Federal District Court Judge Augelli in Newark, New Jersey, in relation to certain funds of mine that had been seized via jeopardy assessment.

This case involved interest equalization taxes and I was proceeding before the Federal judge to receive relief from the Internal Revenue Service and force the IRS to give certain documents to me to relieve myself of interest equalization taxes.

It was determined that if my tax case could be resolved, that this money would be of vital necessity in order for me to relocate because of the tremendous expense that would be incurred by myself and that these funds would also be necessary [135] to help create a new life for myself. Eventually, after innumerable hours in discussion with the U.S. Attorneys and the FBI, between myself and my family, which included my two children, my mother-in-law and father-in-law who lived with me and my wife, and after very persuasive conversations, we finally decided, my family and I, that yes, I would testify for the United States Government, relying on the government's promises.

Preparation for the cases were [sic] immediately begun. I went before the grand jury where indictments were handed down and Angelo DeCarlo, Joseph Polvorino, Daniel Cecere and others were indicted. It is at this time that I met with an individual who identified himself to be from a special unit of the Justice Department, whose sole duty was the relocation of witnesses such as myself. A list was prepared by us which detailed the following: (a) that a birth certificate would be created in the name of my choice, or a name that they would give me and placed within the city hall of the city that they would choose; (b) that my school records would be collected from the schools that I had gone to from public school through college and that these would be converted into school records with the new name that was to be given and would be placed in new schools of their choice; (c) an employment history would be created for me; and (d) a new military back-

ground would be created for me. In addition, I would be given a social security card, a military identification card, driver's license, birth certificate, * * *

* * * * *

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Mr. FELDMAN: Have you testified in Federal court against other organized crime figures?

Mr. ZELMANOWITZ: I have.

Mr. FELDMAN: Could you identify those figures?

Mr. ZELMANOWITZ: Angelo Rossi, Gil Beckley, Joseph Green, Howard Silverman, and others.

Mr. FELDMAN: What was the nature of the charges that were brought against those defendants?

Mr. ZELMANOWITZ: Transporting of stolen securities across State lines, amongst others.

Mr. FELDMAN: Can you please explain why in one of those cases you failed to identify Anthony Salerno?

Mr. ZELMANOWITZ: I notified the Assistant U.S. Attorney prosecurint [sic] the case that I didn't know the person known to be Anthony Salerno as the person I knew and was in business with. For whatever reason they proceeded with it. A couple of days before the trial, in preparation for it, I again was shown photographs and was not able to identify him as such. In the courtroom I stated this was not the Anthony Salerno I did business with.

Mr. FELDMAN: So under penalty of perjury you now state under oath you did not know the Anthony Salerno who was a defendant in that trial?

Mr. ZELMANOWITZ: Absolutely.

Mr. FELDMAN: Mr. Zalmanowitz, in our executive session [225] in June, the week before July 4th, we were talking about some of the businesses in which organized crime was in-

volved. You have alluded to the fireworks business, I believe?

Mr. ZELMANOWITZ: Yes.

Mr. FELDMAN: Would you briefly recite some facts on that very topical area?

Mr. ZELMANOWITZ: I was just trying to show that there are so many ways that organized crime earns money. I chose what I thought would be a ludicrous one for you. It happens to be a fact that a week or two before July 4th literally hundreds of truckloads of fireworks are brought into Brooklyn, New York, for example, and certain segments and certain sections of Brooklyn are delegated to members of organized crime or their friends. No one can sell fireworks in that area.

As ludicrous as it sounds and as small as it may seem, I can assure you that there are millions of dollars earned every July 4th by the sale of fireworks in Brooklyn, New York.

Mr. FELDMAN: So you can't stand on a corner in Brooklyn, New York, and sell fireworks without getting the approval of organized crime?

Mr. ZELMANOWITZ: I wouldn't say on any corner. In many sections of Brooklyn, no, you cannot.

Mr. FELDMAN: Do you have knowledge of any other foreign bank accounts established to hide illegal business transactions from the view of American authorities?

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